American Bar Association
www.supremecourtpreview.org

Nos. 08-295 & 08-307

IN THE

Supreme Court of the United States

TRAVELERS INDEMNITY COMPANY, TRAVELERS CASUALTY AND SURETY COMPANY and TRAVELERS PROPERTY CASUALTY CORP.,
Petitioners,

—v.—

PEARLIE BAILEY, ET AL.,
Respondents.

(caption continued on inside front cover)

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN SUPPORT OF RESPONDENTS FOR *AMICI CURIAE* JAGDEEP S. BHANDARI, SUSAN BLOCK-LIEB, ERWIN CHEMERINSKY, INGRID HILLINGER, GEORGE W. KUNEY, CHARLES W. MOONEY, JR., THERESA J. PULLEY RADWAN, KEITH SHARFMAN, MICHAEL D. SOUSA, ETTIE WARD, AND ROBERT M. ZINMAN

RICHARD LIEB
Research Professor of Law
St. John's University School of Law
8000 Utopia Parkway
Jamaica, New York 11439
(212) 479-6020, or
(718) 990-2312

Counsel of Record for *Amici Curiae*

Dated: February 26, 2009

COMMON LAW SETTLEMENT COUNSEL,

Petitioners,

—v.—

PEARLIE BAILEY, ET AL.,

Respondents.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES v

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

POINT I—THE 1986 INJUNCTION FAILED TO CONTAIN REQUIRED DETAIL OF WHAT IT PROHIBITED. THE 2004 "CLARIFYING ORDER" CONTAINED THE FIRST INJUNCTION AND NON-DEBTOR RELEASE OF THE INDEPENDENT CLAIMS AGAINST TRAVELERS, AND PRESENTED THE FIRST OPPORTUNITY TO APPEAL FROM AN ORDER CONTAINING SUCH PROVISIONS..... 8

POINT II—CONGRESS COULD NOT HAVE INTENDED § 1334(b) "RELATED TO" JURISDICTION TO AUTHORIZE EXTINGUISHMENT OF INDEPENDENT CLAIMS AGAINST AN INSURER BY A PERMANENT INJUNCTION AND NON-DEBTOR RELEASE IN A CHAPTER 11 PLAN AND CONFIRMATION ORDER..... 10

A. Congress Intended "Related To" Jurisdiction To Extend Only To Claims That Have An Effect On The Debtor Or Are Derivative Of The Debtor's Liability. 10

PAGE

B. Class Action Principles Illuminate That Congress Did Not Intend To Confer Bankruptcy Jurisdiction To Extinguish Independent Claims As An Aggregated Class, Without Affording Each Claimant An Option To Withdraw From The Class In Order To Pursue His or Her Claim Individually. 16

C. Congress's Protection Of Property Interests In The Bankruptcy Code Animates Its Intention Not To Confer Jurisdiction To Release And Discharge Non-Debtors From Liability On Independent Claims By Means Of Injunctions And Non-Debtor Releases In Chapter 11 Plans And Confirmation Orders. 19

D. Provisions Of Bankruptcy Code § 524(g) Demonstrate That Congress Did Not Intend To Confer Jurisdiction In Asbestos-Dominated Chapter 11 Cases To Permanently Enjoin Prosecution Of Independent Tort Causes Of Action Against Insurers..... 21

PAGE

POINT III—EVEN IF THE COURT INTERPRETS § 1334(b) AS CONFERRING JURISDICTION TO PERMANENTLY ENJOIN AND RELEASE RESPONDENTS' INDEPENDENT CLAIMS AGAINST TRAVELERS, SUCH PROVISIONS VIOLATE THEIR CONSTITUTIONAL RIGHTS..... 24

A. Granting An Injunction Against Respondents' Independent Claims Without Notice That They Would Be Extinguished, Or A Hearing, Would Violate Their Fifth Amendment Right To Due Process..... 25

i. Respondents' independent tort causes of action are property under the due process clause.... 26

ii. Respondents were not given notice calculated to warn them that their independent tort causes of action were to be extinguished by confirmation of the chapter 11 plan..... 26

iii. Respondents were not provided an opportunity to be heard..... 29

B. Granting The Permanent Injunction At Issue Violated The "Takings" Clause Of The Fifth Amendment. 29

PAGE

i. Respondents' independent causes of action in tort against Travelers constitute property for purposes of the "takings" clause of the Fifth Amendment. 29

ii. The "takings" clause prohibits a taking except "for public use," and also prohibits a taking without "just compensation" even if "for public use." 32

C. Granting An Injunction Against Respondents' Independent Claims Violated Their Seventh Amendment Right To Trial By Jury. 34

CONCLUSION 36

TABLE OF AUTHORITIES

Cases: PAGE

Armstrong v. United States, 364 U.S. 40 (1960) 30

Boddie v. Conn., 401 U.S. 371 (1971) 29

Boston Chamber of Commerce v. City of Boston, 217 U.S. 189 (1910) 33

Callaway v. Benton, 336 U.S. 132 (1949) 10

Celotex Corp. v. Edwards, 514 U.S. 300 (1995) 5, 10, 11, 31

Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986)..... 14

Dames & Moore v. Regan, 453 U.S. 654 (1981)..... 30

Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340 (1998) 34

Germaine v. The Connecticut National Bank, 988 F.2d 1323 (2d Cir. 1993)..... 35

Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989)..... 33

Granny Goose Foods v. Bhd. of Teamsters & Auto Truck Drivers, 415 U.S. 423 (1974) 8

Gray v. United States, 21 Ct. Cl. 340 (1886)..... 31

Hanover Nat'l Bank v. Moyses, 186 U.S. 181 (1902) 32

PAGE

Hansberry v. Lee, 311 U.S. 32 (1940)..... 28

Harstad v. First Am. Bank, 39 F.3d 898 (8th Cir. 1994)..... 14

Hawaii Housing Authority v. Midkiff, 472 U.S. 229 (1984)..... 33

In re Aircrash in Bali, Indonesia, 684 F.2d 1301 (9th Cir. 1982)..... 31

In re Bermec Corp., 445 F.2d 367 (2d Cir. 1971)..... 14

In re Combustion Eng'g, Inc., 391 F.3d 190 (3d Cir. 2004)..... 14

In re Dow Corning, 280 F.3d 648 (6th Cir. 2002)..... 14, 15

In re Johns-Manville Corp., 517 F.3d 52 (2d Cir. 2008).....2, 3, 11

In re Joint Eastern and Southern District Asbestos Litigation, 982 F.2d 721 (2d Cir. 1992).....2, 13

Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982) . 14

Kelo v. City of New London, 545 U.S. 469 (2005)..... 33

Langenkamp v. Culp, 498 U.S. 42 (1990) 35

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982).....19, 26

PAGE

Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935) 30

Lynch v. United States, 292 U.S. 571 (1934) 30

MacArthur v. Johns-Manville Corp., 837 F.2d 89 (2d Cir.), *cert denied*, 488 U.S. 868 (1988) 11

Malinski v. New York, 324 U.S. 401 (1945) 19, 25, 26

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 25, 26, 27

Original Great Am. Chocolate Chip Cookie Co. v. River Valley Cookies, 970 F.2d 273 (7th Cir. 1992) 9

Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999).....5, 17, 18

Pacor, Inc. v. Higgins, 743 F.2d 984 (3d Cir. 1984) 12

Richards v. Washington Terminal Co., 233 U.S. 546 (1914) 33

Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984).....30, 31

Schmidt v. Lessard, 414 U.S. 473 (1974) 8

Smith v. Swormstedt, 57 U.S. 288 (1854)..... 28

Societe Internationale Pour Participations Industrielles Et Commerciales, S.A. v. Rogers, 357 U.S. 197 (1958).....25, 26

PAGE

United States Trustee v. Price Waterhouse, 19 F.3d 138 (3d Cir. 1994) 13, 23

United States v. Gen. Motors Corp., 323 U.S. 373 (1945)..... 30, 33

United States v. Security Industrial Bank, 459 U.S. 70 (1982)..... 13, 24

Walker v. City of Hutchinson, Kan., 352 U.S. 112 (1956) 27

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980)..... 30

Zerand-Bernal Group, Inc. v. Cox, 23 F.3d 159 (7th Cir. 1994)..... 14

Statutes:

United States Constitution, Fifth Amendment.....*passim*

United States Constitution, Seventh Amendment.....*passim*

United States Constitution, Fourteenth Amendment.....*passim*

28 U.S.C. § 157(a)..... 3

28 U.S.C. § 1334(b).....*passim*

Bankruptcy Code (11 U.S.C.) § 327(a) 24

Bankruptcy Code (11 U.S.C.) § 362(d) 6, 20

Bankruptcy Code (11 U.S.C.) § 363(e) 6, 20

Bankruptcy Code (11 U.S.C.) § 364(d) 20

PAGE

Bankruptcy Code (11 U.S.C.) § 524(g) ..... *passim*

Bankruptcy Code (11 U.S.C.) § 1141(d)(1)(A) 32

Rules:

Federal Rule of Civil Procedure 65 8

Fed. R. Civ. P. 65(d)(1)..... 8

Federal Rule of Bankruptcy Procedure 7023..... 23

Federal Rule of Bankruptcy Procedure 7065..... 8

Federal Rule of Civil Procedure 23..... *passim*

Other Authority:

H.R. 95-595 (1977) 20

INTEREST OF *AMICI CURIAE*[1]

The *Amici Curiae* are law professors who have devoted their careers to the study and teaching of bankruptcy law and the subject matter jurisdiction of the bankruptcy courts.[2] They are keenly interested in this appeal because it provides an opportunity for the Court to resolve the uncertainty among the lower courts as to whether the release in chapter 11 plans of reorganization of claims against non-debtors, for which the debtor has no liability, are within the scope of bankruptcy jurisdiction under the "related to" portion of 28 U.S.C. § 1334(b).

By this *pro bono* brief in support of Respondents, the *Amici* offer their analysis of the issue to provide what assistance it may be to the Court as it considers this important issue. The *Amici* believe that unique aspects of their analyses demonstrate that

---

[1] The *Amici* file this brief with the written consent of all parties. No counsel for a party has authored this brief in whole or in part. No person or entity, including the *Amici* or their counsel, made a monetary contribution for the preparation or submission of this brief; it has been prepared *pro bono*.

[2] The *Amici* are Jagdeep S. Bhandari, Professor of Law, Florida Coastal School of Law; Susan Block-Lieb, Professor of Law, Fordham Law School; Erwin Chemerinsky, Dean and Distinguished Professor, University of California, Irvine School of Law; Ingrid Hillinger, Professor of Law, Boston College School of Law; George W. Kuney, Professor of Law, University of Tennessee College of Law; Charles W. Mooney, Jr., Charles A. Heinbold, Jr. Professor of Law, University of Pennsylvania Law School; Theresa J. Pulley Radwan, Professor of Law, Stetson University College of Law; Keith Sharfman, Professor of Law, Marquette University Law School; Michael D.Sousa, Professor of Law, University of Denver College of Law; Ettie Ward, Professor of Law, St. John's University School of Law; and Robert M. Zinman, Professor of Law, St. John's University School of Law.

Congress could not have intended § 1334(b) to extend jurisdiction to a bankruptcy court to include in a chapter 11 confirmation order provisions permanently enjoining and releasing state law causes of action against a non-debtor based solely on its own wrongdoing, for which no recovery could be had from the chapter 11 debtor, its estate, or its insurance policies. Even if so intended, the *Amici* urge that a bankruptcy court would, by authorizing such provisions, violate the Fifth and Seventh amendment rights of the holders of these independent causes of action.

Like the Second Circuit Court of Appeals in its 1992 decision dealing with efforts to resurrect the Manville trust after it ran out of money scarcely two years after plan confirmation in 1986, and again in its decision below, the *Amici* are mindful of the extraordinary efforts made in the Manville bankruptcy case to compensate victims of exposure to its asbestos. The *Amici*, however, also recognize the importance of living by the rules of law, including the limitations of jurisdictional statutes, and the wisdom of turning back efforts to bend legal rules in order to achieve a worthy goal. *See In re Joint Eastern and Southern District Asbestos Litigation*, 982 F.2d 721, 750-51 (2d Cir. 1992) (invalidating a class action solution for asbestos-grounded claims against Manville because it was "in violation of applicable legal rules"); *In re Johns-Manville Corp.*, 517 F.3d 52, 66 (2d Cir. 2008) ("A court's ability to provide finality to a third-party is defined by its jurisdiction, not its good intentions.").

SUMMARY OF ARGUMENT

The intended meaning and scope of the phrase "related to" in § 1334(b) is anything but clear. In hundreds of opinions, bankruptcy and appellate courts have struggled to interpret § 1334(b)'s phrase, "proceedings . . . related to cases under title 11." The *Amici* believe that, in doing so, some bankruptcy courts[3] have extended § 1334(b) beyond both its intended meaning and permissive constitutional scope to accomplish the overriding beneficial purposes of chapter 11. In that vein, the Bankruptcy Court below exceeded its jurisdiction in pursuit of its pervasive quest to provide for those injured by Manville. It did so by failing to distinguish between derivative claims based on Manville's conduct, of which it had jurisdiction to authorize a non-debtor release, and independent claims against Travelers[4] based on its non-derivative liability for its own alleged wrongdoing, which were not recoverable from Manville, the bankruptcy estate, or its insurance policies. In the *Amici's* view, § 1334(b)'s grant of jurisdiction should not be construed as authorizing a non-debtor release of an independent claim in the absence of clear and unmistakable language evidencing Congress's intent to confer extraordinary jurisdiction that crosses constitutional limits, or at least raises serious constitutional concerns.

The *Amici* also urge that Travelers' provision of funds to Manville in settlement of their dispute over

---

[3] Under 28 U.S.C. § 157(a), the bankruptcy courts exercise the jurisdiction conferred on the district courts by 28 U.S.C. § 1334(b).

[4] "Travelers" refers to one or more of the entities whose names includes "Travelers," as listed in *In re Johns-Manville Corp.*, 517 F.3d at 55 n.3.

the policies Travelers sold to Manville cannot serve as a basis for jurisdiction to extinguish these independent claims. Under Manville's plan of reorganization and trust, as under § 524(g) of the Bankruptcy Code enacted to codify the structure of that trust, the only claims "channeled" to the trust were those against Manville, not those against its insurers based on their independent liability for their own alleged tortious conduct. Because the insurance settlement and Manville's reorganization dealt solely with Manville's liabilities, these independent claims against Travelers, for which Manville had no liability, had no connection to Manville's chapter 11 case. Congress could not have intended "related to" jurisdiction to exist between two unconnected matters with no potential to affect a bankruptcy estate even though they may have a common background.

Congress's intent not to confer jurisdiction under § 1334(b) to permanently enjoin and release insurers from their own independent liabilities is evident from its exclusion from § 524(g) of permanent injunctions barring claims to enforce independent liabilities. In asbestos-dominated chapter 11 cases, § 524(g) provides for permanent injunctions to bar the prosecution of claims against an insurer only if their gravamen is a derivative liability of the insurer predicated on a liability of the debtor. *See* § 524(g)(2)(B)(i)(I) (the injunction must implement a trust which only assumes "the liabilities of a debtor"); § 524(g)(4)(A)(ii)(III) (the injunction may only protect an insurer from "claims against, or demands on the debtor."). The theory is that because independent claims have no bearing on the chapter 11 debtor, its estate, or its insurance, they should not be "channeled" to such trust. Because such independent claims against a non-debtor insurer are not

connected to the debtor's bankruptcy, the trust, or its insurance, they have no effect on the debtor. Jurisdiction thus does not extend to extinguish them under the Court's § 1334(b) test for relatedness. *See Celotex Corp. v. Edwards*, 514 U.S. 300, 308 n.6 (1995) (holding that no jurisdiction exists if there is "no effect on the debtor").

These provisions, if construed as urged by Petitioners, aggregate all such independent claims against Travelers into a single class in the chapter 11 case in order to extinguish them without the need to address their merits or to pay anything to the claimants for them. None of the claimants were given a right to withdraw from this non-consensual mandatory class in order to pursue individually their independent causes of action against Travelers. Because of the similarity between this single class aggregating these independent claims against Travelers and class actions governed by Federal Rule of Civil Procedure 23, the basic protections afforded to the claimants in Rule 23 class actions illuminate that § 1334(b) was not intended to confer bankruptcy jurisdiction to extinguish these aggregated independent claims without such protections. As explained by the Court in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999), Anglo-American jurisprudence requires that a person have a day in court on his or her claim as a party to an action, or, if not a party, that such person's interests be "adequately represented by someone with the same interests who is a party." Section 1334(b) could not have been intended to confer bankruptcy jurisdiction to extinguish these independent claims without a day in court and the other protections required in class actions.

Congress also wrote its jurisdictional provisions in § 1334(b) against the backdrop of the importance of property rights in our society and in the law. Property rights have been elevated to the highest level of legal recognition by the protection they are afforded by the Fifth and Fourteenth Amendments. Congress has implemented these constitutional fundamentals in its bankruptcy legislation. In important provisions of the Bankruptcy Code designed to aid in accomplishing reorganization in chapter 11 cases for the benefit of the entire creditor body, Congress placed explicit limitations in order to protect the property interests of non-debtors. For example, "adequate protection" of property interests is required by § 362(d)(1) where the automatic bankruptcy stay, although essential to reorganize, injures property; and § 363(e) likewise requires such protection where a debtor's property is being sold in chapter 11 to further the reorganization. Because Congress could not have intended a sharp departure from the premise of its bankruptcy legislation to protect property interests, § 1334(b) should not be construed to confer jurisdiction to destroy these independent claims.

The *Amici* also urge that the Bankruptcy Court's authorization of these provisions violated the Fifth and Seventh Amendments. These independent claims constitute protected property interests entitled to the Fifth Amendment's due process protections of reasonably detailed notice, an opportunity to be heard, adequate representation, and a determination on their merits, rather than extinguishment by injunction and release. These provisions also took Respondents' independent claims without compensation, in violation of the Fifth Amendment's "takings" provision. Manville's confirmed plan did

not provide for a distribution on these independent claims against Travelers because Travelers' liability, not being derivative of Manville's liability, was not "channeled" to, or paid from, the Manville trust. The independent claims were thus extinguished without just compensation. Further, such extinguishment of Respondents' independent tort claims, as claims at law, deprived them of their Seventh Amendment right to trial by jury.

At the least, serious constitutional concerns are presented by the Bankruptcy Court's extinguishment of Respondents' property interests by the 1986 Confirmation Order or the 2004 "Clarifying Order." Such concerns bear heavily on the interpretation of § 1334(b) and call for it to be construed so as not to lay a jurisdictional foundation for such extinguishment. If, however, the Court interprets § 1334(b) to confer such jurisdiction, the *Amici* urge the Court to hold that such provisions violate the Constitution.

Finally, the 1986 injunction did not make clear that it supposedly barred these independent claims against Travelers. Respondents thus properly objected to the permanent injunction when it was granted for the first time by the 2004 "Clarifying Order," and the Circuit Court correctly reversed it.

POINT I

THE 1986 INJUNCTION FAILED TO CONTAIN REQUIRED DETAIL OF WHAT IT PROHIBITED. THE 2004 "CLARIFYING ORDER" CONTAINED THE FIRST INJUNCTION AND NON-DEBTOR RELEASE OF THE INDEPENDENT CLAIMS AGAINST TRAVELERS, AND PRESENTED THE FIRST OPPORTUNITY TO APPEAL FROM AN ORDER CONTAINING SUCH PROVISIONS.

A basic principle applied in federal court is "that those against whom an injunction is issued should receive fair and precisely drawn notice of what the injunction actually prohibits." *Granny Goose Foods v. Bhd. of Teamsters & Auto Truck Drivers*, 415 U.S. 423, 444 (1974) (citing Federal Rule of Civil Procedure 65).[5] This principle is founded not only on a desire to provide basic fairness to those against whom an injunction is sought, but also to ensure that an appellate court "know[s] precisely what it is reviewing." *Schmidt v. Lessard*, 414 U.S. 473, 477 (1974). It has also been recognized that:

> An injunction that does not comply with . . . [Rule 65] may not place the person "enjoined" under any legal obligation, in which event he would lack the tangible stake in seeking to vacate it that Article III of the Constitution requires in any proceeding sought to be main-

[5] Fed. R.Civ.P. 65(d)(1), made applicable to bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7065 requires that every order granting an injunction "shall state its terms specifically; and describe in reasonable detail—and not by reference to the complaint or other document—the act or acts restrained or required."

> tained in any federal court, including a court of appeals. An injunction that has no binding force at all simply cannot be appealed.

Original Great Am. Chocolate Chip Cookie Co. v. River Valley Cookies, 970 F.2d 273, 275-76 (7th Cir. 1992).

The injunction included in the 1986 Confirmation Order did not provide fair and specific notice of what the injunction actually prohibited, and it certainly omitted reasonable detail to make clear that it was written to bar the prosecution of these independent tort claims against Travelers. But, that omission is not a surprise. Before the 1986 injunction was issued, Travelers acknowledged that "the injunction is intended only to restrain claims against the res (i.e., the Policies) which are or may be asserted against the Settling Insurers."[6] (Underlining in original). In fact, the injunction's language in the 1986 order was so vague and ambiguous that 18 years later in 2004, Travelers thought it essential to ask the Bankruptcy Court to issue a precisely drawn injunction, called a "Clarifying Order," to restrain these independent claims against it. That was the first time Respondents could object to such provisions, and was Respondents' first opportunity to appeal an injunction barring their independent claims. It is from this 2004 order that Respondents appealed. Respondents have thus appealed at the earliest possible time the Bankruptcy Court's order purporting to enjoin their independent claims against Travelers. The Circuit Court below properly addressed and voided the injunction.

---

[6] Letter Agreement dated June 3, 1985 signed by Travelers, paragraph 7, Respondent's Joint Appendix 11a, 13a-14a.

POINT II

CONGRESS COULD NOT HAVE INTENDED § 1334(b) "RELATED TO" JURISDICTION TO AUTHORIZE EXTINGUISHMENT OF INDEPENDENT CLAIMS AGAINST AN INSURER BY A PERMANENT INJUNCTION AND NON-DEBTOR RELEASE IN A CHAPTER 11 PLAN AND CONFIRMATION ORDER.

A. Congress Intended "Related To" Jurisdiction To Extend Only To Claims That Have An Effect On The Debtor Or Are Derivative Of The Debtor's Liability.

The meaning of § 1334(b) "related to" jurisdiction in bankruptcy cases is anything but clear, having been addressed by hundreds of decisions of bankruptcy and appellate courts before and after the Court's decision in *Celotex*, 514 U.S. 300. There, the Court reviewed the development of this issue across the circuits and concluded that § 1334(b) "related to" jurisdiction does not exist where there is "no effect on the debtor." *Id*. at 308 n.6. The question thus becomes whether the permanent injunction and non-debtor release of the independent claims against Travelers have an "effect on the debtor." Simply put, they do not because these claims could not be recovered from Manville's estate or its insurance policies, and their outcome one way or the other could not affect Manville, its assets or its insurance. The provisions at issue fall outside *Celotex's* test, and, as held by the Court decades ago in *Callaway v. Benton*, 336 U.S. 132 (1949), a bankruptcy court cannot permanently enjoin the prosecution of

a state law cause of action if its outcome could not affect the debtor or its estate.

Congress could not have intended relatedness to be established simply by the need to obtain funds for a reorganization, either through a settlement with an insurer or otherwise. Section 1334(b) was not intended as a "blank jurisdictional check" for a bankruptcy court to authorize anything that an insurer may demand in negotiations with the debtor for the settlement of disputed policy obligations. Otherwise, "related to" jurisdiction would be limitless, as extending to anything an insurer demands to be written into a chapter 11 plan or confirmation order.

The Circuit Court below clearly understood the distinction between derivative and independent causes of action in its decision, 517 F.3d at 63, just as it did 20 years earlier in *MacArthur v. Johns-Manville Corp.*, 837 F.2d 89, 92-93 (2d Cir.), *cert denied*, 488 U.S. 868 (1988). *MacArthur* upheld an injunction against the prosecution of actions against insurers because the claims asserted were "completely derivative of Manville's rights as primary insured," and thus "are no different in this respect from those of the asbestos victims" because they both seek "to collect out of the proceeds of Manville's insurance policies on the basis of Manville's conduct." *Id.* at 91, 92-93. The insurers' liability under consideration in *MacArthur* was fundamentally different from their non-derivative tort liability at issue here, as carefully noted below. By the terms of Manville's confirmed plan, just as under § 524(g) of the Bankruptcy Code, the only claims that could be "channeled" into, and paid from, the trust were those against Manville or those derivative

of Manville's own liability. These independent claims were thus not "related to" Manville's bankruptcy.

In addition to their independent claims alleging tort liabilities against Travelers, Respondents could have asserted claims against Travelers that *were* derivative of Manville's liability. Such derivative claims against Travelers would in essence have been claims against Manville based on its own wrongs. Manville had liability on those derivative claims and therefore, Travelers had liability thereon by reason of its issuance of insurance policies to Manville. Travelers' liability on such derivative claims was "channeled" to and recoverable from the trust.

Such claims against Travelers asserting derivative liability, as well as those asserted directly against Manville, were properly discharged and enjoined by the Bankruptcy Court's 1986 orders because Manville was a debtor in bankruptcy with limited funds that could not satisfy its liabilities, entitling it to a bankruptcy discharge of the unsatisfied portion. By sharp contrast, Travelers could not be discharged from its independent liabilities, not only because it did not submit all of its assets to its creditors in a bankruptcy filing, which yields a discharge, but also because its funds were sufficient to pay these independent claims in full. Each claimant was thus entitled to an adjudication of the merits of his or her independent claim against Travelers, absent his or her acceptance of a settlement offer.

The fact that these independent claims against Travelers arose from asbestos injuries is wholly irrelevant. "[C]ommon issues of fact" did not connect these independent claims to Manville's chapter 11 case. *See Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984). Congress would not have intended a

common background of two unconnected matters to form a basis for "related to" jurisdiction.

Nor can § 1334(b) have been intended to authorize non-debtor releases of independent causes of action on the basis that public good is achieved by confirming a chapter 11 plan providing distributions to thousands of injured persons. Indeed, the recovery by those injured by Manville would be enhanced if the independent claims against Travelers are not extinguished. In this regard, while sitting as a judge of the Third Circuit Court of Appeals, Justice Alito rejected the interpretation of a bankruptcy statute urged by a chapter 11 debtor even though, as found by the lower court, it "would jeopardize any hope that the Debtor has of presenting a business plan demonstrating that the Debtor has any chance at reorganization." *United States Trustee v. Price Waterhouse*, 19 F.3d 138, 140, 142 (3d Cir. 1994).

Jurisdiction was not intended by Congress where the only predicate is to achieve an important goal for the public good, however important or worthy it may be. Even the commands of the Fifth Amendment must be enforced, "however great the Nation's need" may be to relax its requirements. *United States v. Security Industrial Bank*, 459 U.S. 70, 77 (1982). As also stated in *Joint Eastern* in decertifying a class of Manville victims: "[W]e cannot uphold as 'sensible' or 'useful' or 'fair' or even 'achieving the most good for the most people' an impairment of rights accomplished in violation of applicable legal rules." *Joint Eastern*, 982 F.2d at 750. Moreover, the provisions at issue may not have been crucial to Manville's reorganization. Travelers could have changed its mind, as parties in interest in bankruptcy cases often do, or a settlement could

have been pursued by Manville with its insurers on other terms. *See In re Bermec Corp.*, 445 F.2d 367, 369 (2d Cir. 1971) ("Creditors have been known to change their minds when a plan is actually put on the table.").

Congress could not have intended § 1334(b) to confer jurisdiction to extinguish these independent causes of action for the further reason that it would run afoul of the cardinal principle, of which Congress was surely aware, that parties cannot voluntarily confer subject matter jurisdiction on a federal court. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986). Like other federal courts, the subject matter jurisdiction of the bankruptcy courts is grounded in, and limited by, statute. *See Celotex*, 514 U.S. at 307 (referring to 28 U.S.C. § 1334(b)); *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). This principle underpins the uniform holdings of the circuit courts that parties cannot write jurisdiction into a plan of reorganization. *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 228 (3d Cir. 2004) ("Where a court lacks subject matter jurisdiction over a dispute, the parties cannot create it by agreement even in a plan of reorganization."); *Zerand-Bernal Group, Inc. v. Cox*, 23 F.3d 159, 164 (7th Cir. 1994); *Harstad v. First Am. Bank*, 39 F.3d 898, 902 n.7 (8th Cir. 1994).

It is surprising that the Petitioners rely on the oft-cited decision, *In re Dow Corning*, 280 F.3d 648 (6th Cir. 2002), because that decision strongly supports Respondents. *Dow Corning* enumerates seven factors that must be satisfied for a permanent injunction and non-debtor release to be within a bankruptcy court's "related to" jurisdiction. Two of

Dow Corning's mandatory factors obliterate the Petitioners' position. Specifically, *Dow Corning* states that a non-debtor release and permanent injunction barring the assertion by non-consenting parties of their claims against a non-debtor may be permitted only if numerous requirements, including the following two, are satisfied:

> (5) The plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction; [and]
>
> (6) The plan provides an opportunity for those claimants who choose not to settle *to recover in full*; . . . .

Dow Corning, 280 F.3d at 658 (emphasis added). What *Dow Corning* would require to support a permanent injunction of these independent tort claims against Travelers is an offer of a monetary settlement to all who have such claims and a right for each rejecting claimant to withdraw from the class so as to be free individually to pursue his or her independent claim against Travelers.

The provisions at issue flunk *Dow Corning's* test for bankruptcy jurisdiction if the 1986 injunction were interpreted as urged by Petitioners. If so construed, the injunction barring suit against Travelers on these independent claims precludes any opportunity whatsoever for any recovery thereon because Manville is not liable for Travelers' alleged torts, and Travelers will itself have been discharged from liability thereon. Section 1334(b) should not be interpreted as conferring jurisdiction to do so.

B. Class Action Principles Illuminate That Congress Did Not Intend To Confer Bankruptcy Jurisdiction To Extinguish Independent Claims As An Aggregated Class, Without Affording Each Claimant An Option To Withdraw From The Class In Order To Pursue His or Her Claim Individually.

Congress could not have intended to confer jurisdiction on a bankruptcy court to lump claims into a class for their omnibus extinguishment by a permanent injunction and non-debtor release in a chapter 11 plan and confirmation order, because well-established class action principles would clearly be violated by such extinguishment of Respondents' claims,

- without any vote by the class members on a provision in the chapter 11 plan for such a permanent injunction;
- without any representation in the chapter 11 case of their interests by a party having the same interest as all of the class members;
- without a right for class members to file claims in the chapter 11 case based on the extinguishment of their independent claims;
- without an adjudication in the chapter 11 case of the merits of the class members' independent claims against the non-debtor;
- without offering any settlement in the chapter 11 case to the class members to mitigate the loss of their independent claims; and
- without affording each class member the option to reject a proferred settlement as part of

> the reorganization and to withdraw from the class so as to be able to pursue his or her independent claim individually.

If § 1334(b) were interpreted as the Petitioners contend, the claimants will never have any basis for any recovery on their independent tort causes of action. These injunctive and non-debtor releases were written into Manville's reorganization plan with a blind eye to the fundamental protections required for a class of claimants whose claims are released and discharged by process of the law, without their adjudication on the merits or just compensation for their extinguishment. Absent a clear statement of Congressional intent to confer jurisdiction on the bankruptcy courts to do so, § 1334(b) should not be so construed.

The Court carefully explained the use and limitations of class actions in *Ortiz*, 527 U.S. 815. In that asbestos-injury class action initiated in 1993 for approval of a settlement proposed with the filing of the complaint initiating the action, certification under Federal Rule of Civil Procedure 23 of a "mandatory" class was denied. The Court explained that, if there is a "limited fund" available for distribution, such a "mandatory" class action is permissible under Rule 23(b)(1), in which members of the class do not have a right to exclude themselves from the class in order to pursue their own claims individually, whereas where a fund is available to satisfy the class members' claims in full, Rule 23(b)(3) requires that each have the right to "opt out" of the class. *Ortiz*, 527 U.S. at 834 n.13. There is a "limited fund" only if the action involves a claim "against a fund insufficient to satisfy all claims." *Ortiz*, 527 U.S. at 833-34.

These class action principles illuminate Congress's intention underpinning § 1334(b). Congress could not have intended in an available-funds context, such as where the debtor's insurer is financially strong, to confer bankruptcy jurisdiction under § 1334(b) to grant a non-debtor release and injunction barring independent tort claims without an option for each claimant to "opt out." To do so would run counter to the fundamental principle requiring that each claimant be given the chance to exclude himself or herself from the class whose claims were being released, as is required by Rule 23(b)(3) in an available-funds class action. *Ortiz*, 527 U.S. at 834 n.13. In the present case, because Travelers was financially sound, the fund available to satisfy the claimants' independent causes of action against it was not "limited." Section 1334(b) should not be construed to confer bankruptcy jurisdiction to extinguish independent claims against a non-debtor which can be satisfied from an *unlimited* fund.

Moreover, the Court made clear in *Ortiz* that, for several reasons, "serious constitutional concerns" would be raised by a rule that would permit a mandatory class action that does not afford each class member a right to "opt out." *Id.* at 845. First, it would violate "our deep-rooted historic tradition that everyone should have his [or her] own day in court." *Id.* at 846. Second, it "compromises [the class members'] Seventh Amendment rights without their consent." *Id.* at 846. Third, these principles may be relaxed "when, in certain limited circumstances, a person, although not a party, has his [or her] interest adequately represented by someone with the same interests who is a party . . . ." *Id.* at 846 (citation omitted). Each of these fundamental considerations was disregarded when these perma-

nent injunction and non-debtor release provisions were granted by the Bankruptcy Court. When it crafted § 1334(b)'s "related to" jurisdictional grant, Congress did not intend to confer jurisdiction on a bankruptcy court that would drastically depart from these cardinal principles.

C. Congress's Protection Of Property Interests In The Bankruptcy Code Animates Its Intention Not To Confer Jurisdiction To Release And Discharge Non-Debtors From Liability On Independent Claims By Means Of Injunctions And Non-Debtor Releases In Chapter 11 Plans And Confirmation Orders.

Property occupies an exalted position in our society and in the law. Property interests are protected by the Fifth and Fourteenth Amendments to the Constitution, and causes of action owned by a bankruptcy debtor constitute property protected by those Amendments. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982); *Malinski v. New York*, 324 U.S. 401, 415 (1945) (noting that the Due Process Clause has the same meaning in the Fifth and Fourteenth Amendments). Moreover, Congress has implemented protection for property rights in provisions it has written into the Bankruptcy Code. Congress would not have intended to depart from the fundamental approach involving the protection of property interests when it conferred "related to" bankruptcy jurisdiction in § 1334(b). Congressional intent may be discerned from a number of important provisions in the Bankruptcy Code designed to make chapter 11 a workable structure to deal with and resolve the debtor's financial problems. Significantly, in each such instance, Congress made provision to protect

the property interests of the parties affected by its bankruptcy goal-oriented provisions.

One such provision of the Bankruptcy Code is the "automatic stay" imposed by § 362, which arises by virtue of the filing of a petition commencing a bankruptcy case. That provision is essential for a chapter 11 debtor to have a breathing spell from creditors' claims while it goes about reorganizing. But despite the overriding importance of the automatic stay provision to a debtor's ability to reorganize, Congress specifically provided for the protection of property that is declining in value while its owner is subject to the stay, by mandating in § 362(d)(1) that the owner receive "adequate protection" of the property interest during the continuance of the stay. Further, sales of a chapter 11 debtor's property are often essential for the debtor to reorganize, and Congress thus authorized major property sales under § 363 with court authorization based on a finding of "adequate protection" of a nondebtor party's interest in the property sold, as mandated by § 363(e). Likewise, although post-petition financing is critical for chapter 11 debtors, Congress, by § 364(d), once again required that "adequate protection" be provided for a property interest affected by the credit it authorizes the debtor in possession to receive.

These provisions are illustrative of many included by Congress in the Bankruptcy Code that reflect its policy determination to protect property interests in bankruptcy cases. When enacting provisions for its overriding requirement of "adequate protection," Congress stated that "the concept of adequate protection, is based as much on policy grounds as on constitutional grounds." H.R. 95-595, 95th Cong. 1st

Sess. 339 (1977). In light of Congress's policy determination to protect property interests in its bankruptcy legislation, it is not reasonable to construe § 1334(b) as intending to confer jurisdiction on the bankruptcy courts to extinguish independent causes of action against non-debtors without any protections or compensation whatsoever, at least absent a clear statement by Congress of its intention to do so.

D. Provisions Of Bankruptcy Code § 524(g) Demonstrate That Congress Did Not Intend To Confer Jurisdiction In Asbestos-Dominated Chapter 11 Cases To Permanently Enjoin Prosecution Of Independent Tort Causes Of Action Against Insurers.

What Congress intended by § 1334(b) is answered by its clear and explicit provisions in § 524(g), which do not authorize the issuance of a permanent injunction to protect an insurer from independent claims against it that are not recoverable from the chapter 11 debtor, its trust, or its insurance policies. Congress clearly delineated in § 524(g) of the Bankruptcy Code the limited instances in which a permanent injunction may be issued by a bankruptcy court to bar the prosecution of causes of action against insurers in asbestos-dominated chapter 11 cases, and it could not have intended to confer subject matter jurisdiction to issue such injunctions beyond § 524(g)'s limit. Specifically, subsections 524(g)(1)(A) and (B), 524(g)(2)(B)(i)(I) and 524(g)(4)(A)(ii)(III) provide for enjoining independent claims against an insurer in chapter 11 cases only if the insurer's liability is *derivative* of the debtor's liability. Section 524(g) does not authorize enjoining an independent cause of action predicated on the insurer's own tor-

tious conduct. The reason for this is clear—the purpose of that statute, like the Manville trust, was to resolve the asbestos-related liabilities of the chapter 11 *debtor*. It was not designed or written to free an insurer from its independent liabilities. The chapter 11 debtor has no liability for the independent tortious action of its insurers, and the statute thus does not provide for channeling an insurer's independent liabilities to the trust. Section 524(g) does not allow an insurer to shed its independent tort liabilities by means of an injunction and non-debtor release in a chapter 11 plan or confirmation order.

Section 524(g) provides the governing measurement of Congress's intent, which establishes the scope of the "related to" jurisdiction it conferred, and demonstrates that Congress did not intend to confer jurisdiction to permanently enjoin independent tort causes of action against insurers predicated on their own alleged wrongdoing. Although its text is complex, § 524(g) makes clear that an injunction against prosecuting claims may only enjoin those claims which are based on the liability of the chapter 11 debtor arising from claimants' exposure to asbestos and "channeled" into a trust created pursuant to that statute. Thus, subsection 524(g)(1)(B) provides for an injunction if the enjoined claim is to be paid from a trust described in paragraph (2)(B)(i)(I), which, in turn, describes such a trust as one that "assume[s] the liabilities *of a debtor*" arising from exposure to asbestos. (emphasis added). Any doubt about the unavailability of an injunction to bar the prosecution of independent tort claims against an insurer is dispelled by § 524(g)(4)(A)(ii)(III), which plainly states that an injunction can be issued to protect an insurer only if the insurer is or may become liable "for the conduct of . . . *the debtor*."

(emphasis added). Congress could not have intended § 1334(b) to confer jurisdiction on the bankruptcy courts to permanently enjoin independent tort claims against an insurer that are outside the claims structure of § 524(g).

This does not mean that such independent claims against insurers can never be enjoined by a confirmation order in an asbestos-dominated chapter 11 case. They can, but only if each claimant whose claim is to be extinguished in the bankruptcy by such an injunction or non-debtor release is given the right to "opt out" of the class in which such independent claims are placed by the chapter 11 plan, so as to be free to pursue his or her independent claim individually against the insurer. As an alternative to providing such "opt out" provisions in a chapter 11 plan, an "opt out" settlement class action to resolve the independent claims against an insurer could be filed as an adversary proceeding in the chapter 11 case as authorized by Bankruptcy Rule 7023, or commenced in a non-bankruptcy court, each with the protections afforded by Rule 23.

While the Bankruptcy Court in this case stressed the importance of the "global finality" of its permanent injunction, the plain language of § 524(g) stands in the way of interpreting § 1334(b) to confer jurisdiction to issue an injunction barring actions based on independent claims against insurers and to release them from liability thereon. In this regard, Justice Alito, in interpreting bankruptcy legislation in *Price Waterhouse*, 19 F.3d at 142, an appeal before him while a judge of the Third Circuit Court of Appeals, rejected resort to pragmatic concerns of a bankruptcy court to facilitate reorganization and applied the plain language used by Congress in

Bankruptcy Code § 327(a). The same approach to § 524(g) is required, given its plain text. It is evident that Congress did not intend by § 1334(b), as illuminated by the clear and unambiguous provisions of § 524(g), to confer the jurisdiction on the bankruptcy courts urged by Petitioners to accomplish their view of a worthy goal.

POINT III

EVEN IF THE COURT INTERPRETS § 1334(b) AS CONFERRING JURISDICTION TO PERMANENTLY ENJOIN AND RELEASE RESPONDENTS' INDEPENDENT CLAIMS AGAINST TRAVELERS, SUCH PROVISIONS VIOLATE THEIR CONSTITUTIONAL RIGHTS.

By applying the "cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided," *Security Industrial Bank*, 459 U.S. at 78 (referring to a section of the Bankruptcy Code), this appeal may be resolved by a determination that § 1334(b) does not confer jurisdiction to issue the permanent injunction and non-debtor release at issue. Doing so would make it unnecessary to consider the Fifth and Seventh Amendment issues raised by the injunction and release. If, however, the Court determines that § 1334(b) does confer such jurisdiction, the *Amicis'* analysis will establish that enjoining Respondents' claims violates their Constitutional rights under the Fifth and Seventh Amendments.

A. Granting An Injunction Against Respondents' Independent Claims Without Notice That They Would Be Extinguished, Or A Hearing, Would Violate Their Fifth Amendment Right To Due Process.

The Fifth Amendment provides that government shall deprive no person of life, liberty, or property, without due process of law. "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). *See also Malowski v. New York*, 324 U.S. at 415 (noting that the Due Process Clause has the same meaning in the Fifth and Fourteenth amendments); *Societe Internationale Pour Participations Industrielles Et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 209 (1958) (involving the Fifth Amendment's Due Process Clause). In the present case, Respondents' right to due process of law was violated by the Bankruptcy Court's permanent injunction, because: (1) Respondents' independent causes of action constituted property entitled to due process protection; (2) Respondents were not provided notice that a proceeding was instituted to deprive them of their independent tort claims against non-debtors which could not ultimately be recovered from Manville, its estate, the trust or its insurance; and (3) Respondents were not given an opportunity to be heard before their property interests in their tort causes of action were destroyed.

i. Respondents' independent tort causes of action are property under the due process clause.

The Court long ago established that a cause of action is property entitled to due process protection under the Constitution, and has made clear that the Due Process Clauses mean the same thing in the Fifth and Fourteenth Amendments. *See*, *Malinski*, 324 U.S. at 415 (noting that due process of law means the same thing in the Fifth and Fourteenth Amendments). In *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), the Court also made clear that a state law created cause of action is property under the Due Process Clause. *Logan*, 455 U.S. at 428-33. In that case, the Court asserted: "[W]e must determine whether Logan was deprived of a protected interest . . . . The first question, we believe, was affirmatively settled by the *Mullane* case itself, where the Court held that a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." *Id.* at 428. *See also Rogers*, 357 U.S. at 209 (involving the Fifth Amendment's Due Process Clause). Therefore, Respondents' state law created causes of action constitute property entitled to protection under the Fifth Amendment's Due Process Clause.

ii. Respondents were not given notice calculated to warn them that their independent tort causes of action were to be extinguished by confirmation of the chapter 11 plan.

In *Mullane*, the Court articulated the constitutional requirement for notice, stating:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. [citations omitted]. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance [citations omitted]. . . . [W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee. . . . [citations omitted].

Mullane, 339 U.S. at 314-15. Respondents were therefore entitled to notice reasonably calculated to apprise them of any proceedings seeking such permanent injunction. The insertion in the Confirmation Order of a muffled provision extinguishing their independent claims was constitutionally inadequate.

In this case, the insufficiency of notice was patent. Although "notice required will vary with circumstances and conditions," *Walker v. City of Hutchinson, Kan.*, 352 U.S. 112, 115 (1956), in certain situations, such as class actions, a precise notice scheme has been established. *See* Rule 23(c)(2)(B) (requiring "individual notice to all members who can be identified through reasonable effort"); Rule 23(c)(2)(B)(i)-(vii) (enumerating seven items requiring that notice be written in plain, easily understood language).

The notice requirements in class actions provide an appropriate standard against which to measure

what notice was required in the present case, because the need for notice is strikingly similar in both situations. Specifically, in this case the rights at issue are those of individuals who were not represented with respect to their independent claims against the insurers. The injunction at issue violated a fundamental "principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Hansberry v. Lee*, 311 U.S. 32, 40 (1940). An exception to this fundamental principle is made for class actions, where specific protections are given. In such cases, as in the present one, "care must be taken that persons are brought on the record fairly representing the interest or right involved, so that it may be fully and honestly tried." *Smith v. Swormstedt*, 57 U.S. 288, 303 (1854).

In the present case, care was not taken to ensure that Respondents' interests were protected. Specifically, no notice was provided to Respondents in 1986 that their claims against non-debtors were to be extinguished, even though they could have been identified through reasonable efforts. *See* Rule 23(c)(2)(B). Furthermore, Respondents were not provided with notice stating in plain language, or otherwise: "the nature of the action," Rule 23(c)(2)(B)(i), the "claims, issues, or defenses," Rule 23(c)(2)(B)(iii), or the "effect of" an injunction, Rule 23(c)(2)(B)(vii).

iii. Respondents were not provided an opportunity to be heard.

Due Process requires " 'an opportunity . . . granted at a meaningful time and in a meaningful manner,' for [a] hearing appropriate to the nature of the case." *Boddie v. Conn.*, 401 U.S. 371, 378 (1971) (citations omitted). Even when providing a hearing would impose a substantial financial burden on the tribunal, a hearing must be provided. *Id.* at 381. In the present case, Respondents were not afforded any hearing before their constitutionally protected property interests were extinguished.

B. Granting The Permanent Injunction At Issue Violated The "Takings" Clause Of The Fifth Amendment.

The issuance of the injunction by the Bankruptcy Court against Respondents' independent state law causes of action violates the Fifth Amendment prohibition of governmental taking of private property for public use without just compensation. This is because: the "takings" clause, as construed by the Court, (1) prohibits a taking except "for public use," and (2) prohibits a taking without "just compensation" even if "for public use."

i. Respondents' independent causes of action in tort against Travelers constitute property for purposes of the "takings" clause of the Fifth Amendment.

Although the Court has not ruled on whether a tort cause of action is a property interest entitled to protection under the "takings" clause of the Fifth Amendment, such a holding is supported by the Court's willingness to find a protected property

interest in intangible interests and by historical precedent of lower federal courts. Moreover, Justice Powell had stated in a concurring opinion that tort causes of action are entitled to protection from government taking without just compensation. *See Dames & Moore v. Regan*, 453 U.S. 654, 691 (1981) ("The Government must pay just compensation when it furthers the Nation's foreign policy goals by using as 'bargaining chips' claims lawfully held by a relatively few persons.").

The Court has long held that the term "property" in the "takings" clause was not "used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law." *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377-78 (1945). Instead, the Court has been "mindful of the basic axiom that '[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.' " *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984) (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980)). With this axiom in mind, the Court has found numerous forms of intangible interests to be property protected by the "takings" clause. *See, e.g.*, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (trade secrets); *Armstrong v. United States*, 364 U.S. 40 (1960) (materialmens' liens); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935) (real estate liens); *Lynch v. United States*, 292 U.S. 571 (1934) (valid contracts).

Furthermore, lower federal courts have provided takings protection to causes of action in tort since

at least 1886. *See*, *e.g.*, *Gray v. United States*, 21 Ct. Cl. 340, 393 (1886) (stating that "[the tort causes of action] were rights which had value, a value inchoate, to be sure, and entirely dependent upon adoption and enforcement by the Government; but an actual money value capable of ascertainment"); *see also In re Aircrash in Bali, Indonesia*, 684 F.2d 1301, 1312 (9th Cir. 1982) (stating that "[t]here is no question that claims for compensation are property interests that cannot be taken for public use without compensation").

In the present case, Respondents' independent causes of action against Petitioner fit within the Court's rubric of protected property for "takings" clause purposes and are analogous to decisions of lower federal courts. In *Monsanto*, the trade secrets were given "takings" protection because they shared "many of the characteristics of more tangible forms of property." *Monsanto*, 467 U.S. at 1002. Here, the Respondents' state law tort causes of action also share many characteristics of more tangible forms of property in that they are assignable, can be the *res* of a trust, and pass to a trustee in bankruptcy. Respondents' independent causes of action also fit squarely within the lower courts' holdings. *See also Celotex*, 514 U.S. at 308 n.5 (stating that "causes of action owned by the debtor . . . become property of the estate pursuant to 11 U.S.C. § 541. . . .").

ii. The "takings" clause prohibits a taking except "for public use," and also prohibits a taking without "just compensation" even if "for public use."

Independent causes of action against non-debtors are fundamentally different from those against a debtor in bankruptcy. Claims against a debtor in bankruptcy are constitutionally discharged to the extent not satisfied by distributions in the bankruptcy case because the debtor "is willing to surrender all his property for the benefit of his creditors, except such as is exempt by law." *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 189-90 (1902). By sharp contrast, claims against one who does not file for bankruptcy cannot be discharged without providing "just compensation," as mandated by the "takings" clause of the Fifth Amendment. Here, the independent tort causes of action at issue were against an entity that did not surrender all its assets for the benefit of its creditors. Although these claimants' claims against Manville were discharged under § 1141(d)(1)(A) of the Bankruptcy Code to the extent they were unpaid by distributions from the trust, the claimants had a constitutional right to full payment on their claims against Travelers, which was not entitled to a discharge outside of bankruptcy. Nevertheless, Travelers was discharged from liability without surrendering its assets, thereby leaving the claimants without any ability to recover compensation for their independent claims against Travelers, in violation of their rights under the "takings" clause.

The "takings" clause has long been interpreted by the Court (1) to prohibit a taking except "for public use," and (2) to prohibit a taking without "just com-

pensation" even if "for public use." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 245 (1984) (stating, "A purely private taking could not withstand the scrutiny of the public use requirement."). *See also Kelo v. City of New London*, 545 U.S. 469, 477, 491, 500 (2005) (the majority, concurrence, and dissent agreed with the principle of *Midkiff*). *See also id.* at 507 (Thomas, J. dissenting) (stating, "[T]he Takings Clause also prohibits the government from taking property except 'for public use.' "). In the present case, the "takings" clause was clearly violated under either prohibition of that clause because the taking was both for the private benefit of a limited class of injured persons, and was also without any compensation.

It is also settled law that a taking of property without just compensation is unconstitutional even absent a benefit to the governmental agency that takes the property.

> The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking. Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking.

Gen. Motors Corp., 323 U.S. at 378*; Richards v. Washington Terminal Co.*, 233 U.S. 546 (1914). As Justice Holmes concluded almost 100 years ago, the takings clause "requires that an owner of property taken should be paid for what is taken from him . . . [a]nd the question is, What has the owner lost? not, What has the taker gained?" *Boston Chamber of*

Commerce v.City of Boston, 217 U.S. 189, 195 (1910).

The issuance of the permanent injunction and non-debtor release for Travelers reduced the value of Respondents' causes of action to zero. Respondents were not provided with *any* compensation in any form whatsoever on account of their independent causes of action against Travelers. The injunction at issue thus does not pass muster under the Fifth Amendment.

C. Granting An Injunction Against Respondents' Independent Claims Violated Their Seventh Amendment Right To Trial By Jury.

The causes of action at issue were "plain vanilla" state law tort causes of action to recover money damages for Travelers' alleged wrongdoing, including fraud. They present a classic case requiring trial by jury as provided in the Seventh Amendment. This right was violated by the Bankruptcy Court's injunction. "Since Justice Story's time, the Court has understood . . . [the Seventh Amendment] . . .'to refer . . . [to] suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered.' " *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 347-48 (1998) (citation omitted) (emphasis in original). The Court has established "beyond peradventure that '[i]n cases of fraud or mistake . . . a court of the United States will not sustain a bill in equity to obtain only a decree for the payment of money by way of damages, when the like amount can be recovered at law in an action sounding in tort or for money had and received.' " *Granfinanciera, S.A. v.*

Nordberg, 492 U.S. 33, 47-48 (1989) (quoting *Buzard v. Houston*, 119 U.S. 347, 352 (1886)). Because Respondents' claims were ones involving allegations of fraud and other torts for which they sought money judgments, the Seventh Amendment preserved their right to trial by jury.

Moreover, the filing of proofs of claim by the claimants in the Manville chapter 11 case did not effect a waiver of their right to trial by jury of their independent causes of action against Travelers. Under *Langenkamp v. Culp*, 498 U.S. 42, 44-5 (1990), by filing a proof of claim with respect to a claim *at law* otherwise triable by jury, the creditor does waive its Seventh Amendment right to a jury trial, but only with respect to the claim asserted by the filed proof of claim and those necessary to adjudicate the filed claim. The theory for such waiver is that such filing converts the asserted claim at law into an equitable claim as part of the "claims-allowance process" used by bankruptcy courts to determine whether to allow or disallow filed claims.

In this case, there was no waiver of Respondents' independent causes of action against Travelers because they were not part of the "claims-allowance process" that arose from the filing of proofs of claim. As explained in *Germaine v. The Connecticut National Bank*, 988 F.2d 1323, 1327 (2d Cir. 1993), a claim becomes part of the "claims-allowance process" only if its resolution is essential to determine whether to allow or disallow the claim asserted by the filed proof of claim. Here, the resolution of the claimants' independent causes of action against Travelers had no bearing on whether to allow or disallow any proofs of claim they may have filed in the chapter 11 case. These independent claims against

Travelers were not part of the "claims-allowance process," and there was thus no waiver of the Respondents' Seventh Amendment rights.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Second Circuit.

Respectfully submitted,

RICHARD LIEB
Research Professor of Law
St. John's University School of Law
8000 Utopia Parkway
Jamaica, New York 11439
(212) 479-6020, or
(718) 990-1923

Counsel of Record for *Amici Curiae* Professors

Of Counsel:

SHAN A. HAIDER
LANA KOROLEVA
NICHOLAS B. MALITO

Dated: February 26, 2009